question for the jury whether a particular consequence is the natural and proximate result of the wrongdoer's act,[14] so too, in these cases of defamation, it might well be left to the jury to say whether the repetition was the natural and proximate result of the first publication.[15]

With all this strict insistence by the majority of courts on the defendant's non-liability for repetitions, there is this apparent inconsistency in the cases. Where the words are actionable *per se*, the amount of damages which the plaintiff may recover is in the discretion of the jury, which compensates the plaintiff for the loss to his reputation;[16] but this loss of reputation results ordinarily through repetitions by third parties. Then, too, in some cases of defamation where special damage is alleged to the plaintiff's business, the plaintiff is allowed to prove and recover for the general loss of business;[17] but, again, this general loss of business can come only through repetitions. The decision in *Southwestern Tel. & Tel. Co.* v. *Long* obviates this logical difficulty, and reaches a conclusion which, though opposed to the great weight of the decided cases, is entirely consistent with the principles of justice and of law.

MANDATORY INJUNCTIONS, AND THEIR EFFECT PENDING APPEAL.—The jurisdiction of the court of chancery by way of mandatory injunction seems to have been recognized early in the development of the equitable remedy. Lord Hardwicke, in a case which has apparently been overlooked or underestimated, directly commanded the defendant, upon final decree, to remove a wall which he had erected in violation of the petitioner's easement of light;[1] in a later case, he made a similar order on motion.[2] But the courts have preferred to regard as the leading decision on the subject a case in which the mandatory nature of the injunction granted is very doubtful.[3] In that case the order, made on motion, was couched in the form of a prohibition on the

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[14]Lane *v.* Atlantic Works, *supra.*

[15]Bigley *v.* National Fidelity & Casualty Co. (1913) 94 Neb. 813, 144 N. W. 810; Zier *v.* Hofflin, *supra*; Fitzgerald *v.* Young, *supra.*

[16]Melcher *v.* Beeler (1910) 48 Colo. 233, 110 Pac. 181; Burt *v.* McBain (1874) 29 Mich. 260; 4 Sutherland, Damages (3rd ed.) § 1206.

[17]Evans *v.* Harries (1856) 1 H. & N. 250; Riding *v.* Smith, *supra*; *cf.* Ratcliffe *v.* Evans (1892) 2 Q. B. 524; but see Rutherford *v.* Evans (1829) 4 C. & P. 74. In Clarke *v.* Morgan (1877) 38 L. T. R. [N. S.] 354, the court pointed out the logical difficulty involved, and expressed the hope that a court of ultimate appeal would consider the question.

[1]"Upon the whole, I must decree the wall erected by the defendant be pulled down." East India Co. *v.* Vincent (1740) 2 Atk. *83.

[2]Ryder *v.* Bentham (1750) 1 Ves. Sr. *543. The Chancellor, before hearing the argument, observed that "he never knew an order to pull down anything on motion: it is sometimes, though rarely, done on a decree." But, after argument: "Let the parties therefore by consent proceed to a trial at law in case by the plaintiff, for stopping his lights: and the defendant to pull down the scaffold, or polls and boards already raised, and be injoined from building or erecting, whereby any of plaintiff's lights may be obstructed, till after trial had."

[3]Robinson *v.* Lord Byron (1785) 1 Bro. C. C. 588.

defendant.[4] The form was followed by Lord Eldon, who doubted the power of the court to issue an order expressly calling for an affirmative act, but effected the same result by restraining the defendant from refusing to do the act demanded.[5] While there does not appear to have been any doubt concerning the power of equity to command the doing of an act in this evasive way, the earlier decisions manifest a tendency toward great caution in the awarding of the mandatory injunction, treating it as a remedy to be employed only in extreme cases of irreparable injury.[6] But a great equity judge refused to admit that there was cause for any more hesitancy in awarding a mandatory than a preventive injunction,[7] and the traces of the earlier theory may now be seen only in the reluctance of a few courts to give such relief before final decree.[8] Equity will command an affirmative act whenever the circumstances warrant,[9] and the tendency of the modern decisions is to abandon the evasive form adopted by Lord Eldon and followed in many other cases,[10] and to issue the direct order in so many words.[11]

Nevertheless, the custom of awarding the injunction in the restrictive form is firmly established in many American jurisdictions, and has often made the task of determining the nature of a decree very difficult. This is well illustrated by the recent case of *United Railroads of San Francisco* v. *Superior Court* (Cal. 1916) 155 Pac. 463. The plaintiff had sought to enjoin the city of San Francisco from operating on tracks owned by the city in common with the plaintiff a greater number of cars than it was entitled by contract to use. A temporary injunction was granted; the city appealed, and continued to use the property as before, whereupon the plaintiff instituted proceedings to punish the mayor and other officials for contempt. The court decided for the plaintiff, one judge dissenting on the ground that the injunction was mandatory.

It is generally recognized that an appeal from a prohibitory injunction, *i. e.*, one which restrains the defendant from disturbing the

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[4]The injunction granted was "to restrain Lord Byron from using dams, wears, shuttles, floodgates, and other erections, otherwise than he had done before the 4th of April, 1785, so as to prevent the water flowing to the mill, in such regular quantities as it had ordinarily done before the 4th of April." This would seem to be an ordinary case of prohibitory injunction. See Rogers Locomotive etc. Works *v.* Erie Ry. (1869) 20 N. J. Eq. 379, 389.

[5]Lane *v.* Newdigate (1804) 10 Ves. 192.

[6]Isenberg *v.* East India etc. Co. (1863) 3 De Gex, J. & S. *263; Durell *v.* Pritchard (1865) L. R. 1 Ch. 244.

[7]Sir George Jessel in Smith *v.* Smith (1875) L. R. 20 Eq. 500.

[8]Bailey *v.* Schnitzius (1888) 45 N. J. Eq. 178, 13 Atl. 247; Tebo *v.* Hazel (Del. Ch. 1909) 74 Atl. 841; *cf.* Ryder v. Bentham, *supra*; Lane *v.* Newdigate, *supra*.

[9]But see Lexington etc. Bank *v.* Guynn (1869) 69 Ky. 486.

[10]Earl of Mexborough *v.* Bower (1843) 7 Beav. 127; Hervey *v.* Smith (1855) 1 Kay & J. 389; Lawrence *v.* Horton (1890) 62 L. T. R. [N. S.] 749; Cole Silver Mining Co. *v.* Virginia etc. Water Co. (C. C. 1871) 1 Saw. 470, 482.

[11]Jackson *v.* Normanby Brick Co. [1899] 1 Ch. 438; Western Union Tel. Co. *v.* Postal Tel. Co. (9 C. C. A. 1914) 217 Fed. 533.

status quo, does not operate as a stay of the decree.[12] The effect of an appeal and *supersedeas* in such a case is merely to restrain the plaintiff from taking affirmative action to enforce his judgment;[13] it does not nullify the injunction or authorize the appellant to do what the decree forbids his doing;[14] otherwise the right to arrest the action of one committing irreparable damage could be easily defeated by taking an appeal and consummating what was intended before it could be acted upon by the higher court.[15] But the enforcement of a mandatory injunction results in a change in the condition of the *res,* for which the appellant, even if he succeeds, may be unable to recover adequate compensation; therefore, the latter type of injunction is suspended by the appeal.[16] As a result, the question whether an injunction is mandatory or preventive in its nature becomes very important, and the problem is complicated by the prohibitory form in which the mandate is frequently couched. It has been decided that the completion of the act sought to be restrained before the granting of the injunction does not make the injunction mandatory, though the defendant is indirectly ordered thereby to undo what he has done,[17] and that where the main purpose of the injunction is to command an act, it is mandatory, and is therefore suspended by an appeal, notwithstanding the fact that it incidentally imposes a restraint.[18] In *United Railroads of San Francisco* v. *Superior Court,* the dissenting judge adopted the view that the injunction was mandatory because it required the defendant to surrender possession.[19] This requirement, however, is by no means decisive of the question.[20]

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[12]Genet *v.* President etc. of D. & H. C. Co. (1889) 113 N. Y. 472, 21 N. E. 390; Green *v.* Griffin (1886) 95 N. C. 50; see Barnes *v.* Chicago Typographical Union (1908) 232 Ill. 402, 83 N. E. 932.

[13]See Pennsylvania R. R. *v.* National Docks etc. Ry. (1896) 54 N. J. Eq. 647, 35 Atl. 433.

[14]Green Bay etc. Canal Co. *v.* Norrie (2 C. C. A. 1904) 128 Fed. 896; Kentucky etc. Bridge Co. *v.* Krieger (1891) 91 Ky. 625, 16 S. W. 824; Ft. Worth Driving Club *v.* Ft. Worth Fair Assn. (1909) 56 Tex. Civ. App. 162, 121 S. W. 213; see Leonard *v.* Ozark Land Co. (1885) 115 U. S. 465, 6 Sup. Ct. 127. Where defendant had taken an appeal and procured an order staying plaintiff from any execution of his judgment pending appeal, *held,* defendant's disobedience of the injunction was punishable as contempt. Sixth Avenue R. R. *v.* Gilbert etc. R. R. (1877) 71 N. Y. 430; *contra,* Powell *v.* Florida Land etc. Co. (1899) 41 Fla. 494, 26 So. 700; see Blondheim *v.* Moore (1857) 11 Md. 365.

[15]See Green *v.* Griffin, *supra.*

[16]Clute *v.* Superior Ct. (1908) 155 Cal. 15, 99 Pac. 362; see Green Bay etc. Canal Co. *v.* Norrie, *supra*; Maloney *v.* King (1902) 26 Mont. 487, 68 Pac. 1012.

[17]Florida Yellow Pine Co. *v.* Flint River etc. Co. (1913) 140 Ga. 321, 78 S. E. 900; see Longwood Valley R. R. *v.* Baker (1876) 27 N. J. Eq. 166; but *cf.* Central Trust Co. *v.* Moran (1894) 56 Minn. 188, 57 N. W. 471.

[18]Mark *v.* Superior Ct. (1900) 129 Cal. 1, 61 Pac. 436. But the mandatory part of an essentially preventive injunction is stayed by an appeal. See Maloney *v.* King, *supra.*

[19]Clute *v.* Superior Ct., *supra.*

[20]*Cf.* Merchants etc. Co. *v.* Granger (1908) 132 Ga. 167, 63 S. E. 700; Green Bay etc. Canal Co. *v.* Norrie, *supra.*